Supreme Court, U.S.
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No. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

SYLVIA E. McRAE, Petitioner

v.

SAMUEL L. EVANS, III, Respondent

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Sylvia E. McRae
Petitioner, pro se
829 Roberts Avenue
Drexel Hill, PA 19026
Telephone: (610) 449-9674
Telephone: (215) 861-8550

QUESTIONS PRESENTED

On May 1, 2006, in Marshall v. Marshall, 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006), this Court defined probate exception providing uniformity on this issue within the Federal courts' jurisdiction. However, that decision has not been a factor in the Fourth Circuit's ruling in this case. Accordingly, the questions presented are:

1. Did the Appellate Court for the Fourth Circuit err in affirming the judgment of the Federal District Court of South Carolina which did not consider the United States Supreme Court's ruling in Marshall and which invoked probate exception and the Rooker-Feldman doctrine in not permitting Federal jurisdiction of a trust conflict between parties?

2. Did the Appellate Court for the Fourth Circuit err in not granting a stay of proceedings where a Federal tax matter was under consideration?

3. Did the Appellate Court for the Fourth Circuit err in denying diversity jurisdiction which is permitted by Federal Rule of Civil Procedure 28, Section 1332(a)(1)?

4. Did the Appellate Court for the Fourth Circuit deny the testatrix's rights under the 14th Amendment to United States Constitution?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Sylvia E. McRae, 829 Roberts Avenue, Drexel Hill, PA 19026, and Samuel L. Evans, III, 1105 Southgate Drive, Charleston, SC 29407.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Sylvia E. McRae, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 15, 2007.

OPINION BELOW

The unpublished opinion of the Court of Appeals appears in the Appendix. The opinions of the United States District Court for the District of South Carolina at Charleston are also set out in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 15, 2007. A timely petition for rehearing and rehearing en banc was denied on January 9, 2008, and this petition for certiorari was filed within Application 07A797. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 1331, 1332(a)(1) and 1340. The Court also has jurisdiction pursuant to the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

The text of 28 U.S.C. §§ 1331, 1332(a)(1) and 1340 is set out in the Appendix, as is the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The parents of the appellant, Sylvia ("appellant" or "Sylvia"), and appellee, Sam III ("appellee" or "Sam III"), died a little more than a month apart in the spring of 2001. Their father, Samuel Evans, Jr., left his estate to his wife, Gladys. Sam III administered his estate upon Sylvia's relinquishing of that responsibility due to exposure to tuberculosis. However, she was able to assume the responsibility of administering her mother's estate since the incubation time had passed.

Sylvia and Sam III's mother left a will disposing of her property to Sam III and to her granddaughters, Anne and Mary. Her handwritten intentions were simple, but the will drafted and signed on December 5, 1994 was complex in order to achieve her desire of making certain Sam III would never be destitute. The drafter of her will testified in a deposition that "she wanted to make sure he was taken care of."

Sam III wanted to be the only heir to his mother's estate and filed a lawsuit, removing the estate to the court of common pleas, in order to substitute an old holographic will for the will which had been accepted for probate. About a year and a half later, he consented to the dismissal of the lawsuit.

The Estate of Gladys R. Evans qualified for an IRS audit. Upon termination of the audit after the distribution of the father's estate, in December 2004, Sam III immediately petitioned to have the testamentary trust specified in the will changed as to trustee and to eliminate restrictions on the trust. The probate court denied that request. But upon resubmission of the request, the Court did approve modification to the will to permit an elderly, ill cousin to assume trusteeship with no restrictions.

The probate court's Order of November 23, 2005, changing the will, is the basis for Sylvia's subsequent legal defense of the will in the South Carolina Court of Common Pleas, the Federal District Court, and the Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

On May 1, 2006, this Court narrowed the parameters of the probate exception doctrine with the decision in Marshall v. Marshall, 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006). At that time, in a concurring decision, it invalidated the Rooker-Feldman doctrine. However, in the within case, the Marshall decision was ignored as though it had not occurred. Many other federal and district courts used the Marshall decision as a guideline, some while cases were in progress at the time the decision was made. The District Court here chose not to do so, and the Appellate Court affirmed that choice. These courts are in conflict with the U. S. Supreme Court and with other circuit courts.

There was already a federal presence in the will

administration that was not considered by the federal courts. The estate had been under IRS audit and federal, as well as state, taxes were paid. The probate of the estate could not go forward until the IRS concluded the audit and issued a closing letter. As soon as the closing letter was received, the estate administration was attacked for paying taxes by the promotion of a disclaimer scheme for avoidance of all taxes. If an estate is taxed, federal jurisdiction is valid. However, here the federal courts did not give credence to this fact.

Diversity of parties statutorily permits citizens of different states to bring disputes to a federal forum. The within case involves parties from different states: the decedent resided in South Carolina, the executrix resides in Pennsylvania, the major beneficiary resides in South Carolina, and the two other beneficiaries reside in Ohio. The requirements for federal jurisdiction under 28 U.S.C. § 1332(a)(1) were met. However, federal jurisdiction was not granted and the Rooker-Feldman doctrine was cited as a reason, a doctrine that had been made obsolete months before by this Court.

Even without the Marshall decision, the federal courts here should have recognized that the decedent's Fourteenth Amendment right to select her fiduciaries was being denied on the ground of residency in a state. The decedent was a United States citizen and had all the rights that citizenship afforded her. Her selection of a trustee and her assessment of qualifications are paramount here. There should be no state residency requirement imposed by a state probate court. In denying federal jurisdiction, the federal courts also

denied the freedom of choice that the decedent believed she possessed.

Because of these reasons, there is federal jurisdiction in this case. It is respectfully requested that this Court reverse the Fourth Circuit and order the decedent's will to stand.

ARGUMENT

I. THE APPELLATE COURT FOR THE FOURTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE FEDERAL DISTRICT COURT OF SOUTH CAROLINA WHICH DID NOT CONSIDER THE UNITED STATES SUPREME COURT'S RULING IN MARSHALL v. MARSHALL, 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006), AND WHICH INVOKED PROBATE EXCEPTION AND THE ROOKER-FELDMAN DOCTRINE IN NOT PERMITTING FEDERAL JURISDICTION OF A TRUST CONFLICT BETWEEN PARTIES.

A. The United States Supreme Court Has Held Even Before The Decision In Marshall That There Is Federal Jurisdiction Over Probate-Related Actions Between Parties.

In Gaines v. Fuentes, 92 U.S. 10, 22 (1876), the court held that whenever a controversy in a suit between...parties arises respecting the validity or construction of a will..., there is no more reason why

the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties. Also in Gaines, it was determined that federal court had jurisdiction over a suit to restrain enforcement of a probate decree against owners of property claimed by decedent's heir.

There has long been the precedent established by this Court that a state probate proceeding does not prevent federal jurisdiction over rights to the property in the probate matter. See Markham v. Allen, 326 U.S. 490, 494 (1946). The Constitution and the United States Congress give federal jurisdiction which "is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters." See Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909).

Also, in McClellan v. Carland, 217 U.S. 268 (1910), the court recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court. In Payne v. Hook, 74 U.S. 425, 431 (1868), the court held that it was "well settled" that a federal court "as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administration to account and distribute the assets in their hands."

Much more recently, in an article in Parade magazine, "How To Save Our Courts," February 24, 2008, p. 4, Justice Sandra Day O'Connor referred to "settled law" in expressing concern for courts, stating: "Thus, our judicial system has safeguards to ensure

consistency and preservation of the law. But it is threatened when judges ignore settled law and make decisions according to personal or public preferences."

B. Since May 1, 2006, The Marshall Decision Controls Federal Jurisdiction As To Probate Exception.

Here, in the Fourth Circuit Court of Appeals and in the United States District Court for the District of South Carolina, no reference was made in any judgment to the Marshall decision. Many decisions in other circuits, however, have referred to Marshall limiting probate exception.

In the First Circuit Court of Appeals in Mooney v. Mooney, 471 F.3d 246, 248 (C.A.1 Mass. 2006), the court cited Marshall to state that federal court abstention is not warranted in certain cases "closely related to" a domestic relations matter.

In the Second Circuit Court of Appeals the court in Lefkowitz v. Bank of N.Y., ___ F.3d ___, 2007 WL 1839756,(2d Cir. N.Y. June 28, 2007) held:

> ....A federal court properly exercises its jurisdiction to adjudicate rights in property in the custody of a state court where final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. The probate exception can no longer be used to dismiss widely recognized torts such as breach of

> fiduciary duty or fraudulent misrepresentation merely because the issues intertwine with claims proceeding in state court.

Also in the Second Circuit, the District Court in Groman v. Cola, Slip Copy, 2007 WL 3340922 (S.D.N.Y. Nov. 7, 2007), while confirming the probate exception in the case, stated at *8: "Given the recent holdings in Marshall and Lefkowitz, Defendant had an objectively reasonable basis for removal in this case...Defendant should not be penalized for exercising what he reasonably believed to be his prerogative to adjudicate this case in a federal forum."

Again in the Second Circuit, the District Court in Lamica v. LaPierre, Slip Copy, 2006 WL 3423861 (N.D.N.Y. Nov. 28, 2006) refers to Marshall and states at *2: "However, the probate exception does not bar Plaintiff's third and fifth claims, alleging breach of fiduciary duty, because these claims do not seek to probate or annul a will. See id. at 1748."

In the Third Circuit, a District Court in New Jersey in the case of Three Keys, Ltd. v. SR Utility Holding Co., 464 F. Supp. 2d 388, 393, 395, (D.N.J. Dec. 8, 2006) held that: "The Court recognizes that the probate exception to diversity jurisdiction is 'narrow,' Marshall, 126 S.Ct. at 1744, and finds that it does not deprive this Court of subject matter jurisdiction in this case." The Court goes on to decline to dismiss the Complaint as barred by the Rooker-Feldman doctrine, stating that:

> The Supreme Court has warned that the lower courts have at times extended

> Rooker-Feldman far beyond the contours of the Rooker and Feldman cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738 [Exxon Mobil v. Saudi Basic Indus. Corp,] 544 U.S. [280] at 283, 125 S.Ct. 1517, 161 L.Ed.2d 454.

Even in the Fourth Circuit, in Harris v. Onyx Industrial Services, Inc., Slip Copy, 2007 WL 1266145 (S.D.W.Va., May 1, 2007), a West Virginia District Court in its judgment brought up the probate exception to federal jurisdiction at *5 and stated: "The application of the probate exception, which had been applied broadly by some federal courts, was recently narrowed by the United States Supreme Court. Marshall." Also, this court in this case referred to other appellate courts at *9 by stating:

> Similarly, subsequent to the Supreme Court's decision in Marshall, at least one circuit court of appeals has observed that a breach of fiduciary duty claim arising out of the alleged improper administration of an estate is not barred by the probate exception because it does not request that the court administer the estate; rather, it seeks only to impose tort liability. Jones v. Brennan, 465 F.3d 304, 307-08 (7th Cir. 2006).

The Sixth Circuit Court of Appeals also followed Marshall in Wisecarver v. Moore, 489 F.3d 747, 751, 2007 FED App. 213P (6th Cir. Ky 2007) and referred to other courts stating: "Since Marshall, other circuit courts considering similar claims have also held that causes of action alleging breach of fiduciary duties, fraud, and undue influence do not necessarily fall within the scope of the probate exception."

A Sixth Circuit District Court in Kentucky, in Agee v. Amos, not reported in F.Supp. 2d, 2006WL 1794754 (W.D. Ky., June 22, 2006), cited Marshall at *4, stating: "A recent Supreme Court decision reins in this probate exception." The court stated further: "The present case sounds in tort, and clearly, the probate exception to federal jurisdiction does not apply."

Another Sixth Circuit District Court in Tennessee, in Bank of Beaver City v. Branham, Slip Copy, 2006 WL 1469300 (E.D. Tenn., May 24, 2006) at *8, referred to Marshall at 1748, stating: "This pronouncement is clearly applicable to the present case."

In the Seventh Circuit, in an ongoing case, Vito & Nicks, Inc. v. Barraco, Slip Copy, 2006 WL 2598048 (N.D. Ill. Sept. 6, 2006), the District Court stated at *2: "The facts here are analogous to those in Marshall."

Also, the Seventh Circuit District Court in Hoffman v. Sumner, 478 F.Supp.2d, 1024, 1034 (N.D. Ill, March 14, 2007) refused to relinquish jurisdiction stating:

> As the Supreme Court previously noted in Markham, and recognized again in Marshall, a federal court 'may exercise

> its jurisdiction to adjudicate rights' in property in possession of a state court 'where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.' Markham, 326 U.S. at 494, 66 S.Ct. 296."

The Eighth Circuit District Court in Colclasure v. Young, Slip Copy, 2007 WL 3005333 (E.D. Ark. Oct. 11, 2007) at *2 referred to Marshall and to other courts' treatment of probate exception:

> Since Marshall, the Eighth Circuit in one case has addressed the question of whether the probate exception applied. See McAninch v. Wintermute, 491 F.3d 759, 766 (8th Cir. 2007) (determining that the probate exception did not apply when claims did not relate to probate matters but instead were in personam claims regarding breach of contract, libel, and bank's duty to defend decedent)...While the Eighth Circuit has not, since Marshall, addressed a case in which some claims were subject to the probate exception while others were not, the Second, Sixth, and Seventh Circuits have.

In the Ninth Circuit Court of Appeals, the court held in Gherini v. Lagomarsino, Slip Copy, 2007 WL

3342615, C.A. 9 (Cal) Nov. 9, 2007, at *1: "[1] The District Court dismissed Gherini's action with prejudice on the ground that it lacked subject matter jurisdiction due to the 'probate exception' to federal jurisdiction. Following the Supreme Court's subsequent decision in [Marshall], however, that ground is no longer valid."

Also in the Ninth Circuit Court of Appeals, in Campi v. Chirco Trust UDT 02-11-97, 223 Fed.Appx. 584, 585, WL 628049 (C.A.9 Cal.)), the court held: "[1] First, the probate exception does not apply in this case. In Marshall v. Marshall, 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006), the Supreme Court admonished lower courts for applying the probate exception too broadly. Id. at 1748." The court also stated: "Furthermore, even if state courts 'have recognized a state-law tort action for interference with an expected inheritance or gift, ... [a State] may not reserve to its probate courts the exclusive right to adjudicate a transitory tort.' Marshall, 126 S.Ct. at 1749."

In the Ninth Circuit District Court in Masgood v. Saleemi, Slip Copy, 2007 WL 2069853 (W.D. Wash. July 13, 2007), the court stated at *2 that: "Mr. Masgood's claims sound in tort, which under Marshall, fall within the subject matter jurisdiction of a federal court sitting in diversity."

The courts of other circuits have recognized and followed Marshall. However, the judgment rendered in the present case by the Fourth Circuit Court of Appeals did not consider the expansion of Federal jurisdiction caused by the Marshall decision of the United States Supreme Court. The appellate court

was in error. See Hicks v. Miranda, 422 U.S. 332, 344-45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (overruling on other grounds recognized by Bates v. Jones, 131 F.3d 843 (9th Cir. 1997) (lower courts must follow Supreme Court authority until that Court says it is no longer binding).

II. THE APPELLATE COURT FOR THE FOURTH CIRCUIT ERRED IN DENYING JURISDICTION WHERE FEDERAL TAXATION WAS INVOLVED.

There was an Internal Revenue Service audit of the Estate of Gladys R. Evans. The personal representative, Sylvia, cooperated with the auditor to achieve fairness under the Estate tax code. When informed that the audit must go forward due to time restraints and that decedent's husband's estate must be closed, she reported that fact to the Office of the Disciplinary Counsel, in an attempt to have that estate distributed to the Estate she represented. She also filed an IRS Protective Claim to protect the Estate's finances in the future.

The Estate of Gladys R. Evans, and Sylvia personally, came under attack for paying taxes. There was expensive testimony before the probate court propounding the use of disclaimers to avoid estate taxes. The scheme would have been impossible, but the fees were approved. Now, while this appeal is progressing, the probate court has denied the executrix fee upon which the audit was based. Should the probate court prevail, the audit must be reopened.

The United States filed an amicus curiae brief

in the United States Supreme Court case, Marshall v. Marshall, No. 04-1544, November 21, 2005, and stated in that brief at pages 1-2:

> The United States has a substantial interest in the scope of any "probate exception" to federal jurisdiction. Congress has vested the federal courts with jurisdiction over all claims by (and many claims against) the United States, including claims involving federal tax liability. See, e.g., 28 U.S.C. 1340, 1345-1347, 1442, 1444, 2410. Pursuant to those jurisdictional grants, the United States files probate-related claims in federal court, such as claims regarding the tax liability of decedents' estates, and removes to federal court probate-related claims brought against the United States in state court. As a result, the scope of the so-called "probate exception" to federal jurisdiction has arisen, explicitly and implicitly, in cases involving the United States. See, e.g., Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc., 918 F.2d 1065, 1067-1068 (2d Cir. 1990); Estate of Threefoot, 316 F. Supp. 2d 636, 642-645 (W.D. Tenn. 2004). The United States therefore has a substantial interest in preserving its ability to have claims to which it is a party resolved in federal court as provided by Congress.

In Williams v. U.S., 327 F.Supp.2d 720, 722 (S.D.Tex., 2004), the court granted the United States summary judgment in its efforts to collect estate taxes and in the discussion of jurisdiction stated:

> The Government asserts that this Court has jurisdiction under 26 U.S.C. § 7402(a) ("The district courts ... shall have such jurisdiction ... to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws."), 28 U.S.C. § 1340 ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, ...")

In Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1967), the court held that "where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court."

There is the possibility that a stay of proceedings should not have been necessary. Under the South Carolina Probate Code, § 62-1-308(c), "all [relevant probate] proceedings ...shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had." The federal corresponding courts are not mentioned, nor diversity jurisdiction, but extrapolation of the probate rule to the federal forum could be considered and the stay by the federal

appellate court not required to prevent further action on a lower judicial level.

However, the probate court here, while the appeal of the change in the trust was going forward, has affected the collection of appropriate federal estate taxes by nullifying deductions approved by the IRS in its audit. Changes that affect the audit must be reported to the IRS. However, under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, if there is any conflict between federal and state law, federal law shall prevail.

III. THE APPELLATE COURT FOR THE FOURTH CIRCUIT ERRED IN DENYING STATUTORY DIVERSITY JURISDICTION.

Under Federal Rule of Civil Procedure 28, § 1332(a)(1), the requirements were met for federal jurisdiction of this case. The decedent was a resident of South Carolina, as is the beneficiary of her testamentary trust and the major beneficiary of her Estate, Sam III. However, Sylvia is a resident of Pennsylvania and the other beneficiaries of her Estate are residents of Ohio.

Because diversity is a ground for bringing a case to the Federal judicial system, there is a presumption of objectivity and impartiality in that right. However, the removal to Federal jurisdiction of the appeal of the state court's order to change the trust as to trustee and trust restrictions did not give the appellant a forum outside of South Carolina. The United States Magistrate Judge, the United States District Judge, and two of the three judges on the Federal Court of

Appeals panel are South Carolinians.

Federal jurisdiction was not permitted by the United States District Court, which relied on the Rooker-Feldman doctrine. However, earlier than this District Court decision, while concurring in the Marshall judgment, Justice Stevens wrote: "Rather than preserving whatever vitality that the 'exception' has retained as a result of the Markham dicta, I would provide the creature with a decent burial in a grave adjacent to the resting place of the Rooker-Feldman doctrine."

Animosity has been shown toward Sylvia in probate court, much like that described in "Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction," 74 S. Cal. L. Rev. 1479, 1480, which states: "While the probate proceedings are still pending, the daughter files suit against the car dealer and the attorneys in federal district court, in part because she perceives that the probate court judge's actions indicate open hostility toward her, as a resident of another state, and toward her attorneys." Here, there were inaccuracies in the probate court's Supplemental Order of June 26, 2006, and because of that, in subsequent orders of higher courts, to the detriment of the appellant. The appellate court erred in not granting the federal jurisdiction to which the diverse parties were entitled.

IV. THE APPELLATE COURT FOR THE FOURTH CIRCUIT ERRED IN DENYING CONSTITUTIONAL 14TH AMENDMENT RIGHTS TO THE DECEDENT AND TO HER HEIRS.

Under the 14th Amendment to the United States Constitution no state can deny a United States citizen of his rights. However, by affirming a probate court ruling that the decedent's choice for trustee lived too far away to be trustee of the testamentary trust, that right to choose was denied by the appellate court. The decedent knew that the residence of her fiduciary was outside South Carolina. Her right to appoint her representative and succeeding representative has been denied unconstitutionally by a state court. The state court has tortiously interfered with the intentions of decedent's will in modifying the trust as to trustee and restrictions on the trust.

Even before Marshall, the court held in Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909):

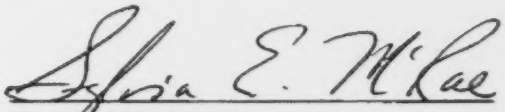
> [I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts ... the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.

The will of the decedent should stand as she approved it.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari be granted to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,



Sylvia E. McRae
Petitioner, pro se
829 Roberts Avenue
Drexel Hill, PA 19026
(610) 449-9674 home
(215) 861-8550 work

Appendix

FILED: January 9, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1476
(2:06-cv-03075-CWH)

SYLVIA E. MCRAE, individually and as Personal Representative, Estate of Gladys R. Evans,

Plaintiff - Appellant

v.

SAMUEL L. EVANS, III,

Defendant - Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Shedd and Senior Judge Hamilton.

For the Court
/s/ Patricia S. Connor, Clerk

FILED: November 15, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1476
(2:06-cv-03075-CWH)

SYLVIA E. MCRAE, individually and as Personal Representative, Estate of Gladys R. Evans,
Plaintiff - Appellant

v.

SAMUEL L. EVANS, III,
Defendant - Appellee

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1476

SYLVIA E. MCRAE, individually and as Personal Representative, Estate of Gladys R. Evans,

Plaintiff - Appellant,

versus

SAMUEL L. EVANS, III,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, Senior District Judge. (2:06-cv-03075-CWH)

Submitted: October 31, 2007
Decided: November 15, 2007

Before WILKINSON and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge

---

Affirmed by unpublished per curiam opinion.

Sylvia E. McRae, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Sylvia McRae appeals the district court's orders remanding her civil proceeding to state court and denying her motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. McRae v. Evans, No. 2:06-cv-03075-CWH (D.S.C. May 15, 2007). We deny McRae's motion and supplemental motion to stay the state court proceedings, and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Sylvia E. McRae,	)	
	)	
Appellant,	)	2:06-3075-CWH
	)	
vs.	)	
	)	
Samuel L. Evans, III	)	**ORDER**
	)	
Respondent.	)	
	)	

This matter arises out of the settlement of the estate of Gladys R. Evans, which entered into probate on June 21, 2001. The appellant was named as personal representative of the estate of Gladys R. Evans ("decedent") and as Trustee of a testamentary trust in the decedent's will. The respondent is a beneficiary of the trust and devisee under the decedent's will. On July 25, 2005, the respondent filed a petition in the Probate Court of Charleston County, South Carolina for an accounting, to change trusteeship, to clarify trust terms, and to surcharge the plaintiff with taxes, interest, and penalties resulting from the alleged violation of her fiduciary duties. On September 8, 2005, and on October 17, 2005, Judge Tamara C. Curry ("Judge Curry") heard these issues. At the October 17, 2005 hearing, the appellant consented to the payment of funeral

expenses out of the estate and certain distributions. On November 23, 2005, Judge Curry ordered the distributions consented to by the appellant and removed the appellant as trustee of the testamentary trust.

The appellant appealed to the South Carolina Court of Common Pleas for Charleston County. On June 13, 2006, Judge R. Markley Dennis, Jr. ("Judge Dennis") affirmed the distributions and payment of funeral expenses and remanded the appeal to the Probate Court with instructions to clarify the basis of the order removing the appellant from her position as trustee. On June 26, 2006, Judge Curry filed a supplemental order with additional findings of facts and held that the appellant was removed as trustee because the plaintiff failed to exercise basic fiduciary responsibilities as a personal representative and as a trustee. The record does not show any subsequent orders in either court.

On October 30, 2006, the appellant filed a notice of removal to the United States District Court appealing from the state court orders and alleging that the state courts permitted the defendant's tortious interference in contravention of the decedent's wishes. On November 15, 2006, Magistrate Judge Robert S. Carr ("Magistrate Judge Carr") remanded this case for lack of jurisdiction to the South Carolina Court of Common Pleas for Charleston County. On November 27, 2006, the plaintiff filed an appeal to this court from Magistrate Judge Carr's order. This matter is now ready for disposition.

In South Carolina, appeals from the probate court must be to the circuit court unless the parties not

in default consent to an appeal to the South Carolina Supreme Court. S.C. Code Ann. § 62-1-308. This court has no appellate jurisdiction over the South Carolina courts and cannot review their decisions except to the limited extent it is authorized to so in cases in which prisoners seek writs of habeas corpus. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923); 28 U.S.C. § 2241. Therefore, this Court lacks subject matter jurisdiction to review the state court decisions that the appellant wishes to appeal. Accordingly, the appellant's case is remanded to the Court of Common Pleas for Charleston County from which it was removed.

AND IT IS SO ORDERED.

/s/
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

April 25, 2007
Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Sylvia E. McRae, as Representative of the Estate of Gladys R. Evans,	)	C/A No.: 2:06-3075-CWH- RSC
Plaintiff,	)	Order
vs.	)	
Samuel L. Evans, III,	)	
Defendant.	)	

This matter has been removed from state court by Sylvia E. McRae, "appellant" (hereinafter "McRae"), who is appearing individually, and as personal representative for the Estate of Gladys R. Evans. The matter was one initially filed in probate court on June 21, 2001. McRae alleges this court has jurisdiction to hear this matter based on the diversity statute. In addition, she alleges this court has jurisdiction over matters that "are not solely the administration of a will in probate, nor that involve the annulment of a will." *See* Exhibit 1, page 1. McRae also claims that this court has jurisdiction because tax disputes should be settled in federal court. *See* Exhibit 1, page 2. Samuel L. Evans, III (hereinafter "Evans"), who is the "respondent" in this removal, began "tortious interference" with the administration of the estate by

removing the matter from probate court to the state circuit court. McRae claims that Evans attempted to replace the probated will of Gladys R. Evans with a very old holographic will which designated Evans as the sole heir to her estate. McRae alleges the estate was returned to the probate court upon voluntary withdrawal of the removal.

The other estate was that of Gladys R. Evans' late husband, who predeceased her by approximately one month. As a result, Gladys R. Evans estate was "incomplete" due to the nondistribtion of her husband's estate, which was also in probate. Evans was the personal representative of this other estate.

At some undisclosed point, the Internal Revenue Service (IRS) began an audit of Gladys R. Evans' estate. McRae alleges that taxes for the estimated estate, (including wife's inheritance from husband), were paid using funds that Gladys R. Evans had in her estate at the time of her death. The audit increased the tax liability and a protective claim was filed in case the amount of the estate changed and the audit had to be reopened. A closing letter from the IRS was issued in December of 2004.

Shortly thereafter, Evans sought an accounting and also asked to change the trusteeship of a testamentary trust in the will of Gladys R. Evans. The accounting took place and the probate court denied the change in the trusteeship. McRae alleges the probate court subsequently entered a 60% distribution of the estate although no closing letter had been received from the South Carolina Department of Revenue. The probate court eventually changed the trusteeship of the testamentary trust to an "elderly person", not

named by Gladys R. Evans, and without the restrictions placed on the trust by her will. Attorneys fees for two separate hearings were paid in the amount of $34,227.37. The order granting the change in trusteeship was appealed to the state circuit court. The circuit court order, attached as an exhibit to the removal, reveals that the order of the probate court was affirmed in part and remanded in part. The order (Exhibit B) indicates that McRae consented to those portions of the order in which the circuit affirmed the probate court. The circuit court remanded the case for clarification as to the factual basis for removing the original trustee for the testamentary trust. It appears then, that this portion of the proceeding is still pending.

The removal to federal court, however, was filed because McRae alleges the state circuit court permitted the "tortious interference" of Evans through his counsel in contravention of the wishes of Gladys R. Evans by allowing the change in trusteeship to occur in contravention of the will of Gladys R. Evans.

DISCUSSION

A defendant in a case in a state court may remove that case to a federal district court ***only if the state court action could have been originally filed in a federal district*** court. 28 U.S.C. § 1441. Generally, a case can be originally filed in a federal district court if there is diversity of citizenship under 28 U.S.C. § 1332 or there if there is so-called "federal question" jurisdiction under 28 U.S.C. § 1331. Case law in this Circuit, however, recognizes the well-

established "probate exception" to diversity jurisdiction, i.e., federal courts have no jurisdiction over matters that are exclusively within the jurisdiction of state probate courts. *See* Beattie v. J.M. Tull Foundation, 941 F. Supp. 57 (D.S.C. 1996). *Cf.* Foster v. Carlin, 200 F. 2d 943, 947 (4th Cir. 1952); Cottingham v. Hall, 55 F.2d 664 (4th Cir. 1932); and Ladd v. Tallman, 59 F.2d 732 (4th Cir. 1932).

In Beattie, *supra*, the Court noted that federal jurisdiction turns on "whether the action could be maintained in a state court of general jurisdiction in the state where the federal court sits." Beattie @58. The court also acknowledged that a federal court would not have jurisdiction over "cases involving the probate of wills, disturbing the possession of an estate in the hands of a state probate court, or involving the conclusiveness of judgements of state courts in probate matters." Beattie @ 59.

The plaintiff in Beattie, *supra*, sought a declaratory judgement regarding the terms of a trust. Plaintiff in that case sought to distribute the entire capital gain of a trust to a life tenant. The estate had been administered and closed some thirty years earlier. In addition, the probate court had taken no action in the case other than receiving the complaint.

This matter, on the other hand, has been handled extensively and almost exclusively by the state probate court since it was originally filed in June of 2001. Thus, to accept the removal of this case would require this Court "to disturb possession of an estate properly in the hands of a state probate court". Beattie @ 59. In addition, determinations as to who will be the trustee for a testamentary trust, accountings,

payments for attorney's fees, and claims filed by taxing authorities are all standard administrative functions for state probate courts. Probate courts have exclusive jurisdiction over all subject matter related to the construction of wills and questions arising in the administration of any trust. S.C. Code Ann. §§ 62-1-302(a)(1) and 62-7-201.

A fair reading of the complaint shows that McRae is attempting to appeal the decision of the Circuit Court. Longstanding precedents preclude the United States District Court for the District of South Carolina from reviewing the findings or rulings made by state courts. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983), where the Supreme Court of the United States held that a federal district court lacks authority to review final determinations of state or local courts because such review can only be conducted by the Supreme Court of the United States under 28 U.S.C. § 1257. *See also* Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

This prohibition on review of state court proceedings or judgments by federal district courts is commonly referred to as the Rooker-Feldman doctrine or the Feldman-Rooker doctrine. *See, e.g.*, Ivy Club v. Edwards, 943 F.2d 270, 284 (3rd Cir. 1991), *cert. denied*, Del Tufo v. Ivy Club, 503 U.S. 914 (1992). The Rooker-Feldman doctrine applies even when a challenge to a state court decision concerns a federal constitutional issue. District of Columbia Court of Appeals v. Feldman, supra, 460 U.S. at 484-486, and Arthur v. Supreme Court of Iowa, 709 F. Supp. 157, 160 (S.D.Iowa 1989). The Rooker-Feldman doctrine also applies even if the state court litigation has not

reached a State's highest court. Worldwide Church of God v. McNair, 805 F.2d 888, 893 & nn. 3-4 (9th Cir. 1986). *See also* 28 U.S.C. § 1738 (federal court must accord full faith and credit to state court judgment); and Robart Wood & Wire Products v. Namaco Industries, Inc., 797 F.2d 176, 178 (4th Cir. 1986), *cert. denied,* Namaco Industries, Inc. v. Robart Wood & Wire Products, 479 U.S. 1032 (1987). Therefore, plaintiff may not use a civil rights action to challenge the determinations or rulings of a probate court. *See* Anderson v. Colorado, 793 F.2d 262, 263 (10th Cir. 1986)("[I]t is well settled that federal district courts are without authority to review state court judgments where the relief sought is in the nature of appellate review."); and Brinkman v. Johnston, 793 F.2d 111, 113 (5th Cir. 1986) (characterization of a suit as a civil rights action is ineffective to defeat the well-settled rule that litigants may not obtain review of state court actions by filing complaints in lower federal courts "cast in the form' of civil rights suits). *See also* Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981); and Gurley v. Superior Court of Mecklenburg County, 411 F.2d 586, 587-588 & nn. 2-4 (4th Cir. 1969)(holding that federal district courts and United States Courts of Appeals have no appellate or supervisory authority over state courts). *Accord* Hagerty v. Succession of Clement, 749 F.2d 217, 219-220 (5th Cir. 1984)(collecting cases), *cert. denied,* Hagerty v. Keller, 474 U.S. 968 (1985); Kansas Association of Public Employees v. Kansas, 737 F.Supp. 1153, 1154 (D.Kan. 1990); and Fuller v. Harding, 699 F. Supp. 64, 66-67 (E.D.Pa. 1988), *affirmed,* Fuller v. Harding, 875 F.2d 310 (3rd Cir. 1989)[Table]. Hence, to the extent

plaintiff believes a probate judge or state circuit court judge improperly applied the law, or the facts, to her situation, she is attempting to "appeal" that decision. Even under the narrow construction given to the Rooker-Feldman doctrine in Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005)(*Rooker-Feldman* doctrine applies only when the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself), plaintiff is barred by that doctrine because she is alleging she was injured by a state court decision. *Cf.* Davani v. Virginia Dept. of Transp., 434 F.3d 712, 2006 WL 91807 (4th Cir. 2006); Lance v. Dennis, 126 S. Ct. 1198, 2006 WL 386360 (2006); Rose v. Board of Supervisors of Fluvanna County, 2006 WL 240979 (W.D. Va.). Additionally, any attempt to appeal the decision of the state court would be prohibited by the decision in Beattie, *supra*, because it involves "the conclusiveness of judgements of state courts in probate matters." Beattie @ 59.

Accordingly, this case is remanded to the Court of Common Pleas for Charleston County. *See* Wachovia Bank National Association v. Deutsche Bank Trust Co., 397 F. Supp.2d 698 (W.D.N.C. 2005)(Magistrate Judge has authority to enter final order remanding case to state court). This order can be appealed to a United States District Judge for review "under the clearly erroneous or contrary to law standard." Vaquillas Ranch Company v. Texaco Exploration & Production, Inc., supra, 844 F. Supp. at 1163. *See also* McDonough v. Blue Cross of Northeastern Pennsylvania, supra, 131 F.R.D. at 467.

Cf. Fed. R. Civ. P. 72(a).

IT IS SO ORDERED.

/s/
Robert S. Carr
United States Magistrate Judge

November 14, 2006
Charleston, South Carolina

STATUTES INVOLVED

28 U.S.C. 1331
Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1332(a)(1)
Diversity of citizenship; amount in controversy; costs
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

28 U.S.C. 1340
Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.

14th Amendment to the United States Constitution
Section 1—
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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No. 07-1519

IN THE

SUPREME COURT OF THE UNITED STATES

SYLVIA E. McRAE, Petitioner

v.

SAMUEL L. EVANS, III, Respondent

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR REHEARING

Sylvia E. McRae
Petitioner, pro se
829 Roberts Avenue
Drexel Hill, PA 19026
Telephone: (610) 449-9674
Telephone: (215) 861-8550

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 6, 2008, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. THE GRANT OF CERTIORARI IN KENNEDY v. PLAN ADMINISTRATOR, 497 F.3d 426, U. S. SUPREME COURT, No. 07-636.

Although denying certiorari in the instant case, the Court granted limited certiorari in Kennedy, a case that has as a basis spendthrift trust provisions of trust law. See Restatement (Third) of Trusts, § 58(1), cmt. c at 359 (2003); Restatement (Second) of Trusts, § 36, cmt. c at 100 (1959); 3 Scott & Ascher on Trusts, § 15.1.9 at 933-934 (5th Ed. 2007). The plaintiff in Kennedy wants to establish the supremacy of federal commonlaw over the rules of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., (ERISA).

In the Kennedy matter, in an amicus curiae brief, the United States refers to the common law of trusts which "serves as ERISA's backdrop," Beck v. Pace Int'l Union, 127 S.Ct. 2310, 2316 (2007), and which "offers a starting point" for interpreting the

statute, Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000). In its brief the United States continues by comparing ERISA's prohibition against assignment or alienation to a trust-law "spendthrift" provision. The United States further describes a spendthrift trust as one that prohibits assignment or alienation of the beneficiary's interest. The only modification a beneficiary can make to a spendthrift trust is to disclaim it, and that is restricted to whether any interest has been accepted and no attempt is being made to direct who the replacement beneficiary might be.

ERISA wisely relies on spendthrift trust limitations to protect the financial interests of beneficiaries. There have been many determinations that the rules of ERISA are dominant in conflicts, such as the conflict in Kennedy. For example, Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001); Boggs v. Boggs, 520 U.S. 837, 850 (1997). The spendthrift trust provision along with mandated federal jurisdiction, provides a safety net for beneficiaries dependant on ERISA.

In an amici curiae brief filed in Kennedy by the American Benefits Council, the Erisa Industry Committee and the National Association of Manufacturers, 2008 W.L. 2781976 (U.S.) at *14-17, permitting courts to become involved in retirement plan controversies is "clearly not the right answer." That determination is valid in the instant case: permitting a court to change a decedent's trust (the equivalent of a retirement plan) to the point of destruction is clearly not right. The amici curiae brief states at *29 "....any benefit disbursements must be made in accordance with existing written plan

provisions, including those with respect to beneficiary designations."

Written specific instructions are the best criteria in any controversy. In "The Philadelphia Inquirer," October 8, 2008 at p. A11, two U.S. Supreme Court Justices are quoted:

> ....DuPont's retirement plan says 'that if you want to change the beneficiary, here's how you've got to change the beneficiary,' Chief Justice John G. Roberts, Jr., said. 'We just have no way of knowing' what William Kennedy intended, Justice Ruth Bader Ginsburg said.

In the instant case, what decedent wanted for her son (appellee) is explicit. (App. 1) Her wishes were reiterated by the drafter of her will in a deposition: "something to the effect of him being able to get his hands on the - I think it was the money from the house or something, that he might waste it, and she wanted to make sure he was taken care of."

In this case, the judicial system is modifying the trust as to restrictions and trustee, not just changing the decedent's wishes, but ignoring law that governs trusts.

If the law that governs trusts is being used to adjudicate a case related to inheritance, and that case is granted certiorari, then it follows that in the instant case, certiorari should be granted when that law is being ignored.

2. MEDICAID (42 U.S.C. § 1396, et seq.) AS A SAFETY NET FOR SPENDTHRIFT TRUST.

After a hearing in South Carolina District Court, petitioner was advised that the testamentary trust was "gone." When petitioner asked, "What will become of my brother?" the answer was "He can go on Medicaid."

Medicaid is a federally-funded program for low-income persons. It is not designed to permit modification of wills and/or trusts.

South Carolina Code § 62-7-502(b) defines a spendthrift trust as "a term of a trust providing that the interest of a beneficiary is held subject to a 'spendthrift trust,' or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary interest."

But there are exceptions to a spendthrift provision under South Carolina Code § 62-7-503(c):

> (c) The exception in subsection (b) [child support orders] is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust's exception from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for any program of public

> benefit, including but not limited to, Medicaid and SSI.

This shows there is legal consideration given to trusts vis-a-vis Medicaid.

However, a new phenomenon, since the Petition for Writ of Certiorari was filed with the Court, is the forecast of massive governmental deficits. The federal government may not be able to fund the safety net programs it has in place now. Reliance on such programs and not attempting to hold together a spendthrift trust for the benefit of appellee would be a dereliction of fiduciary duty.

However, the probate court has attempted to destroy the nature of the trust by removing all restrictions in the trust and the named trustee (petitioner) and ignoring the testatrix' named substitute trustee. This action is contrary to South Carolina Code 62-7-704(c) relative to the appointment of a successor trustee which states:

> (c) a vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
> (1) by a person designated in the terms of the trust to act as successor trustee...
> (3) by a person appointed by the court.

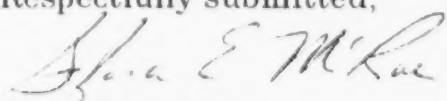
The testatrix in the instant case was not attempting to find someone to inherit money; she was attempting to protect her son. The will states this fact; the drafter of the will confirms it. There is parental concern in this case, not unlike the concern recognized

by this Court in Winkelman ex rel. Winkelman v. Parma City School District, 127 S.Ct. 1994 (U.S., May 21, 2007)(No. 05-983). The Justices, in this case, permitted parents of children with special needs to file suit directly to the Supreme Court and no counsel was necessary. The parents' concern for their children was more important to the Justices than the litigation representation requirement. Here there is also parental concern and petitioner stands in place of the testatrix who is attempting to protect her son.

CONCLUSION

The Court is considering the Kennedy case and the spendthrift trust basis to ERISA, which relate to this case as inheritance matters. The federal government, due to anticipated deficits, may not now be able to maintain safety net programs for persons who have lost inherited funds. For these reasons, as well as those contained in the petition for writ of certiorari, petitioner requests that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,



Sylvia E. McRae
Petitioner, pro se
829 Roberts Avenue
Drexel Hill, PA 19026
Tel. (610) 449-9674 home
Tel. (215) 861-8550 office

No. 07-1519

IN THE
SUPREME COURT OF THE UNITED STATES

SYLVIA E. McRAE, Petitioner

v.

SAMUEL L. EVANS, III, Respondent

CERTIFICATION OF PETITIONER

I hereby certify that this Petition for Rehearing is made in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2008.

Sylvia E. McRae, Petitioner
829 Roberts Avenue
Drexel Hill, PA 19026
Tel: (610) 449-9674
Tel: (215) 861-8550

No. 07-1519

IN THE
SUPREME COURT OF THE UNITED STATES

SYLVIA E. McRAE, Petitioner
v.
SAMUEL L. EVANS, III, Respondent

CERTIFICATION OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 1298 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2008.

Sylvia E. McRae, Petitioner
829 Roberts Avenue
Drexel Hill, PA 19026
Tel: (610) 449-9674
Tel: (215) 861-8550

No. 07-1519

IN THE
SUPREME COURT OF THE UNITED STATES

SYLVIA E. McRAE, Petitioner
v.
SAMUEL L. EVANS, III, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2008, three copies of the Petition for Rehearing were mailed, U. S. mail, postage prepaid, to the following party:

Samuel L. Evans, III
1105 Southgate Drive
Charleston, SC 29407
Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2008.

Sylvia E. McRae

Sylvia E. McRae, Petitioner
829 Roberts Avenue
Drexel Hill, PA 19026
Tel: (610) 449-9674
Tel: (215) 861-8550

APPENDIX

(Trust Excerpt from)
LAST WILL AND TESTAMENT OF
GLADYS RUTH EVANS

SEVENTH: I give, devise and bequeath all of my interest in my home and lot at 1105 Southgate Drive, Charleston, SC, as follows:

a. To my son, Samuel Luther Evans, III, a life interest to live in and reside in and on my real property at 1105 Southgate Drive, Charleston, SC for so long as he resides there as his principal residence and domicile, and so long as he maintains it, with the remainder at his death or abandonment I give and devise in fee simple absolute to my granddaughters, Anne Carter McRae and Mary Evans McRae, their heirs and assigns, provided they survive me. If they do not survive me, then their issue shall take his or her parent's share per stirpes and if said grandchild has no children then the surviving grandchild named above shall take the deceased grandchild's share.

EIGHTH: I give, devise and bequeath 30% of all the rest, residue and remainder of my estate, real or personal, wheresoever situate and of whatsoever nature, of which I may die seized and possessed, or to which I may be entitled to in any way whatsoever at the time of my death, whether acquired before or after the execution of this, my Last Will and Testament, unto my daughter, Sylvia Evans McRae, as Trustee, upon the uses and trust and upon the

terms and conditions hereinafter set out.

a. My Trustee shall hold the property in trust for the benefit of my son, Samuel Luther Evans, III, and shall be authorized to use so much of the income and to encroach upon the corpus in her sole discretion to provide for the proper support of my surviving son, Samuel Luther Evans, III. The Trustee shall not be required to make any payment for the support of my son from the corpus unless in the sole judgment of the Trustee my son is unable to support himself.

b. Said Trust shall terminate when my son shall die. Upon said termination, the Trustee shall divide the property then remaining in her hands into equal shares for my granddaughters, Anne Carter McRae and Mary Evans McRae, surviving me and if they are not surviving me then they shall divide it into equal shares for the issue of the deceased granddaughters aforesaid then living.

c. If at any time before the final distribution of this trust all of the beneficiaries herein named or described should die and there should be no such beneficiary or beneficiaries to take the property or income therefrom or if my son shall have predeceased me, then, and in that event, the property in the hands of my Trustee shall be distributed to my granddaughters, Anne Carter McRae and Mary Evans McRae, their heirs and assigns in equal shares per stirpes.

d. Should Sylvia Evans McRae be unable or unwilling to serve as Trustee or Trustees upon the

uses and trusts and upon the terms and conditions aforesaid, then I hereby nominate, constitute and appoint as alternate Trustee, Mary Evans McRae.

NINTH: Whenever my Trustee in his or her sole discretion shall determine that the size of any find or trust corpus he or she holds does not warrant the cost of continuing such fund and trust, or its administration would be impractical for any other reason, my Trustee without further responsibility, may pay over, transfer and distribute such fund or trust or the income therefrom, to my son and my Trustee shall be discharged with respect thereto.